

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MIDAMERICAN ENERGY)	
COMPANY,)	
)	
Petitioner,)	No. CVCV 063014
)	
v.)	
)	
IOWA UTILITIES BOARD, STATE)	ENVIRONMENTAL LAW AND
OF IOWA,)	POLICY CENTER, IOWA
)	ENVIRONMENTAL COUNCIL, AND
Respondent.)	SIERRA CLUB MOTION TO
)	INTERVENE
)	
)	

COME NOW, Environmental Law and Policy Center, Iowa Environmental Council and Sierra Club (collectively, “Environmental Parties”) file this motion to intervene in order to participate in the judicial review proceeding pursuant to Iowa R. Civ. P. 1.407. In support thereof, the Environmental Parties state as follows:

1. On January 13, 2022, MidAmerican Energy Company (MidAmerican) filed a *Petition for Interlocutory Judicial Review* from a December 16, 2021 Iowa Utilities Board (Board) order in Docket No. SPU-2021-0003. The Board ordered MidAmerican to provide documents claimed as privileged, but not identified in a privilege log or any detail, for in camera review by the Iowa Utilities Board.

2. MidAmerican seeks judicial review on whether certain documents neither produced to the Board nor identified in a privilege log are actually privileged, prior to any privilege determination by the Board. MidAmerican states in its request for relief that it intends to seek an in camera review of the documents to allow the Court to make an original determination of privilege.

3. On February 8, 2022, the Board filed *Respondent's Pre-Answer Motion to Recast Petition and Motion to Enlarge Time to Transmit Certified Record*. The Board requested MidAmerican's motion be treated as an original claim, or alternatively for the Polk County District Court to confirm that in camera inspection is appropriate under Iowa Code section 17A.19(7).

4. The Board created Docket No. SPU-2021-0003 to review MidAmerican's long-term resource plans. *In re MidAmerican Energy Company*, Docket No. SPU-2021-0003, Order Opening Docket and Proposal to Take Official Notice, at 3 (filed May 13, 2021).¹ The Board noted that the issues related to MidAmerican's long-term resource needs are related to portions of a proposed settlement between MidAmerican and the Iowa Office of Consumer Advocate (OCA), as well as specific issues raised by Environmental Parties in Docket No. EPB-2020-0156.

5. The Board stated the purpose of opening Docket No. SPU-2021-0003 is to address the request for further analysis regarding items including, but not limited to, least cost options for emission controls and to evaluate the reasonableness and prudence of MidAmerican's procurement and contracting practices related to the acquisition of fuel for use in generating electricity, as well as to address the forecast of future gas requirements or electric generating needs. *See* Docket No. EPB-2020-0156, *Order Denying Motion for Reconsideration*, (filed May 13, 2021).

6. Furthermore, the Board held SPU-2021-0003 "allows interested parties to analyze MidAmerican's long-term resource needs, including consideration of least-cost options for generation, environmental requirements, reliability, baseload generation, and economic-development potential." EPB-2020-0156, *Order Denying Motion for Reconsideration*, at 2.

7. Environmental Parties were parties in Docket No. EPB-2020-0156, and the Board included them as interested parties in Docket No. SPU-2021-0003 both by virtue of announcing

¹ The Iowa Utilities Board filings are available on the Board's Electric Filing System at <https://efs.iowa.gov/efs>.

SPU-2021-0003 in a docket that Environmental Parties were already party to and including Environmental Parties on the initial service list in SPU-2021-0003.

8. In a separate judicial review proceeding of Docket No. EPB-2020-0156 addressing the scope of Iowa Code § 476.6(19), the Board explained: “The IUB Order noted that Docket No. SPU-2021-0003 would allow interested parties, including Environmental Petitioners and OCA, to participate in an in-depth analysis of MidAmerican’s long-term resource plans.” *Environmental Law and Policy Center et al v. Iowa Utilities Board*, CVCV061992, Respondent’s Brief in Resistance to Petition for Judicial Review, at 11-12 (Polk Co. Dist. Ct., Sept. 21, 2021). The Board went on to argue that:

[T]he IUB opened Docket No. SPU-2021-0003 to explore least-cost alternatives for MidAmerican’s generating fleet, including the potential retirement of coal plants. (CR pp. 989-990). Arguably, since the IUB opened a separate docket in order to adequately explore Environmental Petitioners and OCA’s concerns, and since it is an ongoing, active docket at this time, the creation and continued use of a separate docket adequately addresses any prejudice to Environmental Petitioners and OCA’s rights that they rely on as the statutory basis of this judicial review petition.

Id. at 29.

9. This Court has already held that SPU-2021-0003 was specifically formed to “address all of the important issues raised by [Environmental Parties] regarding analysis of a utility’s long-term resource needs, including consideration of least-cost operation for generation potential retirement of coal plants, environmental requirements, reliability, and economic development potential,” and that the creation of SPU-2021-0003 protected Environmental Parties “substantial rights”. *Environmental Law and Policy Center et. al. v. Iowa Utilities Board, et. al.*, CVCV061992, Ruling on Petition for Judicial Review, pg, 13-14 (December 21, 2021).

10. Despite arguing in front of the Polk County District Court that the Environmental Parties were interested parties in SPU-2021-0003 and their rights protected by the docket, the

Board has refused to clarify whether SPU-2021-0003 is a contested case proceeding and is waiting to do so until this interlocutory appeal is resolved. SPU-2021-0003, Order Addressing Presiding Officer's Recommendations Regarding Issue of Privilege, at 14-15 (filed Dec. 16, 2021) ("The Board will continue to defer its assessment on whether . . . this is a contested case proceeding or an informational docket until both the pending privilege issue before the Board and the confidential treatment directives from the presiding officer have been resolved.").

11. Environmental Parties seek intervention in this matter pursuant to Iowa R. Civ. P. 1.407(1)(b), which allows intervention by right:

When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

12. The test of right of intervention is "interest," not necessity, desire, advantage nor disadvantage of any one party. *Schimerowski v. Iowa Beef Packers, Inc.*, 196 N.W.2d 551, 555 (Iowa 1972).

13. Indeed, Rule 1.407 makes clear that intervention is not limited to those who are a party to the underlying case. The Rule provide that intervention is proper when any entity has an interest in the subject at hand. One is "interested" for purposes of intervention if one has legal right that the proceeding will directly affect. *In Int. of A.G.*, 558 N.W.2d 400, 403 (Iowa 1997).

14. The Court has already decided the issue of whether Environmental Parties are interested parties. The Polk County District Court has already held that the Board initiated SPU-2021-0003 to "address all of the important issues raised by [Environmental Parties] regarding analysis of a utility's long-term resource needs, including consideration of least-cost operation for generation potential retirement of coal plants, environmental requirements, reliability, and

economic development potential,” and that the creation of SPU-2021-0003 protected Environmental Parties’ “substantial rights.” *Environmental Law and Policy Center et. al. v. Iowa Utilities Board, et. al*, Ruling on Petition for Judicial Review, pg, 13-14 (December 21, 2021).

15. As Petitioners only seek to have this Court review issues concerning Docket No. SPU-2021-0003, in which Environmental Parties are an interested party having substantial rights, any rulings or holdings in this case will have an effect on Environmental Parties’ rights in Docket No. SPU-2021-0003 and Environmental Parties’ ability to adequately proceed before the Board.

16. MidAmerican’s petition for judicial review affects the information used by and available to “interested parties, including Environmental Petitioners and OCA, to participate in an in-depth analysis of MidAmerican’s long-term resource plans.”

17. Environmental Parties have a right to challenge the veracity of MidAmerican’s privilege assertions relating to documents ordered to be produced in SPU-2021-0003, as well as provide arguments showing that privilege has never existed or has been waived. Because MidAmerican has framed the interlocutory appeal as both an objection to the Board’s order and a request for the Court to review the documents, this proceeding may be the only opportunity for Environmental Parties to address the privilege claims.

18. In its Petition, MidAmerican explained the privilege being claimed for the first time:

MidAmerican produced and filed information required by the order but withheld certain studies regarding the generation fleet that had been requested by MidAmerican’s General Counsel to evaluate and develop a strategy to address the arguments the special interest groups had been raising (and presumably would continue to raise) in various MidAmerican dockets, including contested case dockets, being litigated before the Board. Such studies are protected by the attorney-client and attorney work product privileges.

(MidAmerican, Petition for Interlocutory Judicial Review, at paragraph 9 (filed Jan. 13, 2022)). It appears that MidAmerican is referencing the Environmental Parties in its justification for asserting privilege.

19. MidAmerican filed its Petition for interlocutory review without ever filing a privilege log in the Board docket or providing an opportunity for the Board to make a determination on its privilege claims. MidAmerican did not describe in any way the information it withheld from the Board and interested parties. The interested parties in the docket did not have the ability to assess the applicability of MidAmerican's privilege claim.

20. The overall consequence of any ruling or hold may impair and impede Environmental Parties' ability to protect their legal interest and substantial rights in SPU-2020-0003 and access important and relevant information.

21. The Board initiated the underlying docket to "address all of the important issues raised by [Environmental Parties] regarding analysis of a utility's long-term resource needs, including consideration of least-cost operation for generation potential retirement of coal plants, environmental requirements, reliability, and economic development potential." The Board and Office of Consumer Advocate are in a fundamentally different position with regard to the issues in the docket. The Board's interest is in maintaining its ability to effectively serve as a regulator overseeing proceedings. The Office of Consumer Advocate is statutorily included in proceedings to represent consumers. The Environmental Parties are not a regulator and are not statutorily included in all utility proceedings, so a ruling may affect their rights differently from the existing parties to the case. The Office of Consumer Advocate may be aligned with the Environmental Parties or could be adversarial to them depending on the facts of the case and positions that the

parties may take. The Environmental Parties will not be adequately represented by the other parties in the case.

22. Alternatively, the Environmental Parties seek permissive intervention under Iowa R. Civ. P. 1.407(2)(b), which allows for intervention when an applicant's claim or defense and the main action have a question of law or fact in common.

23. Environmental Parties argue that documents claimed as privileged by MidAmerican are not privileged. MidAmerican makes a claim for original review of the documents in this judicial review proceeding. Environmental Parties' claim shares questions of law and fact with MidAmerican's claim.

24. The Environmental Parties' participation in the judicial review proceeding will not unduly delay or prejudice the proceeding. Environmental Parties will be prepared to participate in proceedings going forward.

25. As such, for the reason stated herein, Environmental Parties can intervene pursuant to Iowa R. Civ. P. 1.407(1)(b) or 2(b).

WHEREFORE, for the above stated reasons, Environmental Law and Policy Center, Iowa Environmental Council, and Sierra Club request this Court to grant their Motion to Intervene.

Respectfully submitted,

/s/ Joshua T. Mandelbaum

Joshua T. Mandelbaum (AT0010151)
Environmental Law & Policy Center
505 5th Avenue, Suite 333
Des Moines, Iowa 50309
P: (515) 244-0253
jmandelbaum@elpc.org

/s/ Michael R. Schmidt

Michael R. Schmidt (AT0013962)
Iowa Environmental Council
505 5th Avenue, Suite 850
Des Moines, Iowa 50309
P: (515) 244-1194 x211
schmidt@iaenvironment.org

/s/ Gabe Rowberry

M. Gabriel Rowberry (AT0012777)
Sodoro, Mooney, & Lenaghan, LLC
13924 Gold Circle
Omaha, NE 68144
Phone: 402-504-9346
mrowberry@smlawoffice.com
Local Counsel for Sierra Club

DATE: March 7, 2022

CERTIFICATE OF SERVICE

I hereby certify that March 8, 2022 the foregoing document was filed with the Clerk of Court using the EDMS system which will send electronic notice of the filing to the parties of record.

/s/ Joshua T. Mandelbaum